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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
15 **(SOUTHERN DIVISION—HONORABLE DAVID O. CARTER)**

17 MOHSEN REIHANIFAM,  
18  
19 Plaintiff,  
20 v.  
21 FRESENIUS MEDICAL CARE  
NORTH AMERICA,  
22 Defendant.

CASE NO.: SACV12-1580-DOC (JPRx)

**DEFENDANT FRESENIUS  
MEDICAL CARE NORTH  
AMERICA'S MOTION FOR  
JUDGMENT AS A MATTER OF  
LAW UNDER FRCP 50(a)**

Judge: Hon. David O. Carter

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that, at the close of Plaintiff's case in chief, Defendant Fresenius Medical Care North America (Fresenius) will, and hereby does, move the Court for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The motion is made on the following grounds:

- Plaintiff failed to provide a sufficient evidentiary basis for a reasonable jury to find that he was subject to an actionable adverse employment action.
- Plaintiff failed to provide a sufficient evidentiary basis for a reasonable jury to find that any actionable adverse employment action taken by Fresenius was causally connected to protected activity.
- Plaintiff Mohsen Reihanifam (Plaintiff) failed to provide a sufficient evidentiary basis for a reasonable jury to find that he exhausted administrative remedies as required by the Fair Employment and Housing Act (FEHA).
- Plaintiff failed to provide a sufficient evidentiary basis for a reasonable jury to find that Fresenius breached a contractual term.
- Plaintiff failed to provide a sufficient evidentiary basis for a reasonable jury to find that Fresenius breached the implied covenant of good faith and fair dealing.

Because Plaintiff failed to provide sufficient evidence to support his allegations in regard to all of his causes of action (and each of them) Fresenius is entitled to judgment as a matter of law under Fed. R. Civ. Proc. 50(a)(1)(B).

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The relevant factual issues necessary to determine whether Plaintiff met his burden of proof are not in dispute. From August 1986 through August 2010, Fresenius employed Plaintiff. Plaintiff was promoted several times, given raises, bonuses, stock options, and even interest free loans to help him during various

1 “personal crises.” Plaintiff’s final position was Senior Advisor to the Chairman of  
2 the Board of Directors, Mr. Benjamin Lipps.

3 In June 2002, Fresenius entered into a written employment agreement with  
4 Plaintiff, signed by Mr. Lipps. In April 2003, Fresenius entered into a second  
5 written employment agreement with Plaintiff to reflect his position change from  
6 President of the Western Business Unit on the services side of Fresenius to President  
7 of Research and Development on the products side of Fresenius. Maurice Powell,  
8 presently Fresenius’s CEO, signed the 2003 agreement on behalf of the company.  
9 Per the terms of the agreement, the contract would automatically renew each April  
10 1<sup>st</sup> unless either party gave notice of the decision not to renew in writing at least  
11 thirty days in advance of its expiration.

12 On February 14, 2009, Fresenius sent Plaintiff a written notice of its intent not  
13 to renew the agreement. The written employment agreement expired at the end of  
14 March 2009 by its own terms. From April 1, 2009 until his termination of  
15 employment on August 21, 2010, Plaintiff continued to work for Fresenius as an  
16 employee at-will. Plaintiff’s last position with Fresenius was Senior Advisor to Mr.  
17 Ben Lipps.

18 Throughout his employment with Fresenius, Plaintiff never received a  
19 reduction in his base pay. Even upon taking the new at will position, Fresenius gave  
20 Plaintiff a pay raise, bonus, and continued benefits. Plaintiff stayed on at-will as the  
21 Senior Advisor to the Chairman of the Board of Directors, making over \$350,000.00  
22 a year, for over one year prior to his termination in August 2010. In order to ensure  
23 that Plaintiff’s termination would not leave him unemployed, Plaintiff was not  
24 terminated until after he was appointed CEO of a new company – Nephcor, Inc.  
25 Fresenius invested \$1,000,000.00 in Nephcor on the condition that Plaintiff be given  
26 the role of CEO. Plaintiff voluntarily accepted the position of CEO at Nephcor.

27 Plaintiff now alleges that he was subject to adverse employment actions while  
28 employed with Fresenius. Plaintiff provided uncorroborated testimony regarding

1 four alleged adverse employment actions: (1) the 2002 transfer from his position as  
2 President Dialysis Services West Business Unit to President of Dialysis Products  
3 Research & Business Development, Dialysis Products Division; (2) the 2009 non-  
4 renewal of his written contract as President of Research and Development and  
5 transfer to the newly created position of Senior Advisor to the Chairman of the  
6 Board; (3) a systematic exclusion from professional meetings during Plaintiff's time  
7 as President of R&D; and (4) Plaintiff's termination in August 2010. Plaintiff  
8 alleges these acts comprised a continuous pattern of behavior aimed at retaliating  
9 against him for reporting alleged discrimination and/or harassment targeting  
10 minorities.

11 Plaintiff's claims, however, must fail as a matter of law. Plaintiff's presented  
12 evidence in support of his allegations is insufficient for any reasonable jury to find  
13 in his favor. On the retaliation and failure to prevent retaliation claims, neither the  
14 position transfers, nor the alleged exclusion from meetings, had a detrimental effect  
15 on his employment. Plaintiff failed to prove that the alleged retaliatory acts were  
16 tied to a protected activity; and further, each alleged retaliatory act occurred more  
17 than two years prior to his filing of a claim with the Department of Fair  
18 Employment and Housing (DFEH). The contract claim fails because Plaintiff  
19 conceded that Fresenius properly followed the contractually specified procedure for  
20 notification of its intent not to renew the contract, and that he was terminated from  
21 the company more than one year after the contract expired. Likewise, Plaintiff  
22 failed to prove that Fresenius breached the covenant of good faith and fair dealing  
23 because the evidence showed that Fresenius paid Plaintiff all wages or other  
24 compensation earned during the term of the contract and had no duty to pay him a  
25 two year severance when he was terminated from his at will position. Thus, as  
26 explored below, even construing the evidence in the light most favorable to Plaintiff,  
27 his claims are unproven and judgment against him, as a matter of law, is proper.  
28

1 **II. LEGAL STANDARD APPLICABLE TO THE MOTION FOR**  
2 **JUDGMENT AS A MATTER OF LAW**

3 A motion for judgment as a matter of law may be made at any time before the  
4 case is submitted to the jury. Fed. R. Civ. P. 50. The motion must specify the  
5 judgment sought and the law and facts which entitle the movant to that  
6 judgment. *Id.* The motion may be made as to individual allegations, specific  
7 issues, or all claims. *See Davis v. Progressive Cas. Ins. Co.*, 2007 WL 579818, at \*  
8 1(9th Cir. 2007).

9 The motion tests the sufficiency of the evidence offered in support of the  
10 opposing party's causes of action. FRCP Rule 50(a) provides:

11 If a party has been fully heard on an issue during a jury trial and the court  
12 finds that a reasonable jury would not have a legally sufficient evidentiary basis to  
13 find for the party on that issue, the court may:

14 (A) resolve the issue against the party; and

15 (B) grant a motion for judgment as a matter of law against the party on a  
16 claim or defense that, under the controlling law, can be maintained or defeated only  
17 with a favorable finding on that issue.

18 Fed. R. Civ. P. 50(a).

19 A moving party is entitled to a judgment as a matter of law unless, “viewing  
20 the evidence as a whole, ‘there is substantial evidence present that could support a  
21 finding, by reasonable jurors, for the nonmoving party.’” *United California Bank v.*  
22 *THC Financial Corp.*, 557 F.2d 1351, 1356 (9th Cir. 1977) (citing *Quichocho v.*  
23 *Kelvinator Corp.*, 546 F.2d 812, 813 (9th Cir. 1976)). “Substantial evidence” means  
24 “relevant evidence that a reasonable mind would accept as adequate to support a  
25 conclusion.” *Callicrate v. Wadsworth Mfg.*, 427 F.3d 1361, 1366 (Fed. Cir. 2005)  
26 (citing *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992)). Such evidence  
27 cannot be supported by mere “speculation” or “threadbare conclusory statements” in  
28 lieu of significant and considerable proof. *Lakeside-Scott v. Multnomah Cnty.*, 556  
F.3d 797, 802-03 (9th Cir. 2009) (citing *Barnes v. Arden Mayfair, Inc.*, 759 F.2d

676, 680-81 (9th Cir. 1985)). Indeed, “[s]ubstantial evidence is more than a mere scintilla.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938); *Chisholm Bros. Farm Equipment Co. v. International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir. 1974). “If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion ... is proper.” *United California Bank*, 557 F.2d at 1356 (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969)).

Plaintiff completed his case in chief and rested. He had an opportunity to present evidence and testimony in support of his claims against Fresenius. Plaintiff, however, failed to present substantive and verifiable proof to the jury, substituting instead conjecture, speculation, and conclusory statements.

### **III. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH RETALIATION IN VIOLATION OF THE FEHA**

Plaintiff alleges that he was unlawfully retaliated against, under the provisions of FEHA, as a result of his reports of alleged improper activity at Fresenius. To succeed in a retaliation claim, a plaintiff must prove by a preponderance of the evidence that “(1) he or she engaged in a “protected activity,” (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.” *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042, 116 P.3d 1123, 1130 (2005) (*Yanowitz*). Plaintiff claims that he was retaliated against in 2002, 2005, 2009, and 2010 as a result his complaints regarding unfair treatment. However, during his presentation of his case-in-chief, Plaintiff’s own testimony demonstrated that his claims fail as a matter of law.

1           **A. Plaintiff's Retaliation Action Must Fail as He Failed to Present**  
2           **Sufficient Evidence upon Which a Reasonable Jury Could Find**  
3           **that His Transfers, Fresenius's Election Not to Renew His**  
              **Contract, and Exclusion from Meetings Were Adverse**  
              **Employment Actions**

4           An employee seeking recovery on a theory of unlawful retaliation must  
5 demonstrate that he has been subjected to an adverse employment action which  
6 “materially affects the terms, conditions, or privileges of employment.” *McRae v.*  
7 *Dep't of Corr. & Rehab.*, 142 Cal. App. 4th at 386-87 (citing *Yanowitz, supra*, 36  
8 Cal.4th at 1051–1052). “A change that is merely contrary to the employee's interests  
9 or not to the employee's liking is insufficient.” (*Akers v. County of San Diego*, 95  
10 Cal. App. 4th 1441, 1455 (2002). “[W]orkplaces are rarely idyllic retreats, and the  
11 mere fact that an employee is displeased by an employer's act or omission does not  
12 elevate that act or omission to the level of a materially adverse employment  
13 action...” *McRae*, 142 Cal. App. 4<sup>th</sup> at 386-87 (quoting *Thomas v. Department of*  
14 *Corrections* 77 Cal. App. 4th 507, 511 (2000)). Rather, a plaintiff must demonstrate  
15 that the employer's retaliatory actions had a detrimental and substantial effect on his  
16 employment. *Akers*, 95 Cal. App. 4th at 1455; *Thomas*, 77 Cal. App. 4th at 510–11.

17           “A transfer is not an adverse employment action when it is into a comparable  
18 position that does not result in substantial and tangible harm.” *McRae*, 142 Cal.  
19 App. 4th at 393. The evidence shows that in 2002 Plaintiff was laterally transferred  
20 from one executive position within Fresenius to another. Plaintiff did not receive  
21 any decrease in pay, bonuses or other employment benefits as result of the transfer.  
22 Plaintiff's lone discernable complaint regarding his 2002 transfer is that he was  
23 “demoted” in title and responsibility. In his testimony, Plaintiff cited the fact that  
24 the President of R&D position was historically a “vice-president” position, and that  
25 the person who assumed the role after Plaintiff was called a “vice-president.”  
26 Plaintiff did not present any evidence which showed that this historical title disparity  
27 affected a material condition of his employment. In fact, Plaintiff's quibble about  
28 his “President” title, which he held for about 7 1/2 years, reveals that his opposition



1 to the transfer stemmed from his emotional and personal displeasure with  
2 Fresenius's action, and not from any material or detrimental effect on his  
3 employment status.

4 Plaintiff's claim that Fresenius's failure to renew his contract was an adverse  
5 employment action must also fail. The contract was one for a term of a year that  
6 would renew unless one party elected to not renew it. Fresenius had the right to  
7 notify Plaintiff that it would not renew the contract for another year. Even after the  
8 written contract expired, Fresenius continued to employ Plaintiff in an at will  
9 capacity at a higher base rate of pay for another eighteen months.

10 Likewise, Plaintiff failed to present sufficient evidence for a reasonable jury  
11 to conclude that the alleged systematic exclusion from meetings constituted an  
12 adverse employment action. Although Plaintiff opined that the exclusion from the  
13 meetings impeded his ability to do his job and negatively affected his career with  
14 Fresenius, he failed to support that assertion with specific facts. Bald assertions  
15 supported merely by speculation do not constitute sufficient evidence. *Lakeside-*  
16 *Scott v. Multnomah Cnty.*, 556 F.3d at 802-03, *supra*. By relying solely on his  
17 opinion and speculation regarding the exclusion, Plaintiff failed to present sufficient  
18 evidence for a reasonable jury to find for him. Plaintiff had the burden to  
19 demonstrate that the alleged exclusion harmed his employment in some  
20 demonstrable and material way. Plaintiff did not cite a single meeting or group of  
21 meetings (from which he was excluded) which caused such harm.

22 The only cognizable adverse employment action in the present case is  
23 Plaintiff's August 21, 2010 termination from the Fresenius organization. With  
24 regard to that action, Plaintiff has failed to tie it to any protected activity.

**B. Plaintiff's Retaliation Action Must Fail as He Did Not Present Sufficient Evidence upon Which a Reasonable Jury Could Find that an Alleged Adverse Employment Action Was Causally Connected to Protected Activity**

Finally, Plaintiff failed to present adequate evidence to support his claim that the alleged adverse action was causally connected to protected activity. To prevail in a retaliation claim under FEHA, Plaintiff must establish that the alleged protected activity under the FEHA was a "substantial motivating reason" for the retaliatory act. *Harris v. City of Santa Monica*, 56 Cal. App. 4th 203, 232 (2013). Plaintiff must first demonstrate that he engaged in "protected activity" by opposing practices proscribed by FEHA, filing a complaint, testifying, or assisting in a proceeding related to FEHA claims. Then, Plaintiff must show a demonstrable "causal link" between the alleged retaliatory animus and the alleged adverse action. *Mamou v. Trendwest Resorts, Inc.*, 165 Cal. App. 4th 686 (2008). Plaintiff presented no direct evidence, other than his opinion and speculation, which supports a finding that there was a causal connection between any FEHA protected activity and Fresenius's alleged adverse act.

Plaintiff argues that the temporal proximity of the alleged adverse actions to the alleged FEHA protected activity is circumstantial evidence of a retaliatory animus. To establish a causal link on the basis of temporal proximity, Plaintiff must prove that the challenged action occurred "close on the heels of the protected activity." *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000); *see also Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 507 (9th Cir. 2000) (requiring that the challenged action take place "within a reasonable period of time" after the protected activity). The Ninth Circuit has held that events occurring nine months apart are not sufficient to establish a causal link between a protected activity and alleged retaliatory conduct. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (finding that an 18-month lapse was too long to create an inference of causation); *Manatt v. Bank of America*, 339 F.3d 792, 802



1 (holding that nine (9) months between the protected activity and the adverse action  
2 was not sufficiently close in time to establish a causal link). Other judicial circuits  
3 interpreting Title VII retaliation claims (which contain a similar causal connection  
4 requirement) have found even shorter time periods do not support a causal link. *See,*  
5 *e.g. Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (finding that a  
6 three (3) month lapse between protected activity and retaliatory act was too long to  
7 support a finding of temporal proximity); *Hughes v. Derwinski*, 967 F.2d 1168,  
8 1174–75 (7th Cir. 1992) (finding that a four (4) month lapse was too long, as well).

9 In his case-in-chief, Plaintiff presented several email communications which  
10 he described as his complaints regarding Fresenius’s alleged unlawful activity. The  
11 last such email prior to his termination is memorialized in JX0075, a January 13,  
12 2010 email addressed to Mr. Lipps about Mr. Powell’s alleged retaliatory act of  
13 excluding him from a Renal Research Institute (“RRI”) board meeting. Plaintiff’s  
14 comments contained in JX0075 do not, however, comprise protected activity under  
15 the FEHA. To classify as protected activity, Plaintiff’s communication “must have  
16 alerted [Fresenius] to his belief that discrimination, not merely unfair personnel  
17 treatment, had occurred.” *Lewis v. City of Fresno*, 834 F. Supp. 2d 990, 1002 (E.D.  
18 Cal. 2011) (citations omitted). “Under FEHA an employee’s opposition must be  
19 sufficient to put an employer on notice as to what conduct it should investigate.”  
20 *Greer v. Lockheed Martin Corp.*, 855 F. Supp. 2d 979, 987 (N.D. Cal. 2012)  
21 (international quotations omitted); *see also Day v. Sears Holdings Corp.*, 930 F.  
22 Supp. 2d 1146, 1177 (C.D. Cal. 2013) (citing *Peters v. District of Columbia*, 873  
23 F.Supp.2d 158, 202 (D.D.C.2012) (“While informal complaints to management may  
24 constitute protected activity, the plaintiffs must clearly complain about  
25 discriminatory treatment.”)). Plaintiff’s comments in JX0075 do not make any  
26 allusion to *racial* discrimination, unlawful employment practices, or anything else  
27 proscribed by the FEHA. Plaintiff’s email does not even reference, let alone  
28 oppose, discriminatory acts actionable under the FEHA. The evidence showed that

1 it was Mr. Lipps who had made the decision to exclude Plaintiff from the meeting.  
2 It was not necessary for his new role. Plaintiff was told that he could attend the RRI  
3 meeting, but not the board meeting.

4 The last complaint of Plaintiff prior to the January 13, 2010 complaint is  
5 highlighted in JX0046, his May 13, 2009 email to Brian O'Connell. In that email,  
6 *fifteen months prior to his termination*, he states that he was wrongfully "pushed out  
7 of [his] position." Such a length of time, by law, is insufficient to create a  
8 causational inference due to temporal proximity. Even if Plaintiff's communication  
9 memorialized in JX0075 is regarded as a protected activity, it still lacks a temporal  
10 link to his termination. A full *seven months* elapsed between Plaintiff's email in  
11 JX0075 and his termination from Fresenius.

12 The vast length of time between the alleged protected activities and the  
13 alleged adverse action is just too long for a reasonable jury to find a causal  
14 connection. Moreover, the termination occurred only after Fresenius reached a deal  
15 with Nephcor to install Plaintiff as CEO of the company; this was the true  
16 motivation for the termination. As such, Plaintiff failed to demonstrate that his  
17 termination was causally linked to protected activity.

18 Similarly, even if Fresenius's notification to Plaintiff in February 17, 2009  
19 that it would not renew the written contract could be construed as an adverse  
20 employment action, such act was not tied to any protected activity. Plaintiff alleged  
21 that Mr. Powell decided to allow Plaintiff's contract to expire because Plaintiff's  
22 complaint about the September 2008 investigation of Rashmi Murthy was "the last  
23 straw in breaking the camel's back."

24 At his deposition, Plaintiff testified that the IT group, the operations group  
25 and the manufacturing group in Walnut Creek caused the investigation of Rashmi  
26 Murthy in retaliation for the R& D engineers complaining about the response time  
27 from the IT group. April 17, 2014 Deposition of Mohsen Reihanifam, Vol. II at  
28

1 429:3-12; 4306-24. Plaintiff's complaint was not clearly one of discrimination or  
2 retaliation under FEHA.

3 The only other complaints remotely related to FEHA activity occurred in July  
4 2005, almost four years before Plaintiff was notified that his contract would not be  
5 renewed. Because Plaintiff could not establish a causal link between FEHA  
6 protected activity and an adverse employment action, his retaliation and failure to  
7 prevent retaliation claims failed.

8 **C. Plaintiff's Retaliation Claim is Time-Barred under the Fair**  
9 **Employment and Housing Act.**

10 Pursuant to California Government Code § 12960, "[n]o complaint may be  
11 filed after the expiration of one year from the date upon which the alleged unlawful  
12 practice or refusal to cooperate occurred." Cal. Gov. Code § 12960(d). "The statute  
13 is generally calculated from the date the plaintiff files his or her complaint..." with  
14 the DFEH and/or the Equal Employment Opportunity Commission (EEOC).  
15 *Gardner v. City of Berkeley*, 838 F. Supp. 2d 910, 918 (N.D. Cal. 2012) (*Gardner*).  
16 It is uncontroverted that Plaintiff filed his complaint with the DFEH on August 16,  
17 2011. The only alleged adverse employment action which occurred within one year  
18 of that date is Plaintiff's termination from Fresenius on August 20, 2010. Still,  
19 Plaintiff claims that Fresenius should be liable for alleged adverse actions which  
20 occurred in 2002, 2005, and 2009 – actions which, indisputably, occurred outside  
21 the statute of limitations period.

22 Under California's continuing violation doctrine, an employer may be liable  
23 for actions that take place outside the limitations period if – and only if – the actions  
24 are sufficiently linked to unlawful conduct which occurred within the limitations  
25 period. *Lewis v. City of Fresno*, 834 F. Supp. 2d 990, 995 (E.D. Cal. 2011); *see also*  
26 *Yanowitz*, 36 Cal. App. 4th at 1057. The doctrine is only applicable where alleged  
27 retaliation is based on a "temporally related and continuous course of conduct."  
28 *Yanowitz*, 36 Cal.4<sup>th</sup> at 1057-58. Infrequent and unrelated retaliatory activities, even

1 if actionable, do not comprise the basis for a continuing violation allegation. *Id.* To  
2 sustain a continuing action claim, Plaintiff must demonstrate that Fresenius engaged  
3 in a pattern of activities that “(1) [are] sufficiently similar in kind—recognizing...  
4 that similar kinds of unlawful employer conduct, such as acts of harassment or  
5 failures to reasonably accommodate disability, may take a number of different  
6 forms; (2) have occurred with reasonable frequency; and (3) have not acquired a  
7 degree of permanence.” *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1059, 116  
8 P.3d 1123, 1142 (2005) (citing *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 823,  
9 29 P.3d 175, 190 (2001) (*Richards*)). Absent a demonstration that Fresenius’s  
10 alleged pattern of activity was comprised of individual retaliatory events of  
11 sufficient similarity, frequency, and non-permanence, Plaintiff’s claim of a  
12 continuing violation must fail.

13 **D. Plaintiff Did Not Present Sufficient Evidence to Prove that the**  
14 **Alleged Unlawful Course of Conduct was Comprised of a Pattern**  
15 **of Activities that were Similar in Kind or Occurred with**  
16 **Reasonable Frequency**

17 Plaintiff’s allegations fall well short of this standard. First, in regard to  
18 similarity, Plaintiff claims that he suffered various forms of retaliation at the hands  
19 of different actors over a period spanning eight years. Similarity sufficient to satisfy  
20 the continuing violation doctrine’s requirement is not found where the “allegedly  
21 wrongful acts were taken by many different persons, for many different reasons...”  
22 *McRae v. Dep’t of Corr. & Rehab.*, 142 Cal. App. 4th 377, 391 (2006) (*McRae*).  
23 Plaintiff testified that the alleged retaliatory acts were perpetrated by Mr. Lipps (*e.g.*  
24 JX0015), and then later by Mr. Powell (*e.g.* JX0046), and somewhere in between,  
25 by various Fresenius executives and employees, including whole Fresenius  
26 departments – Information Technology and Marketing (*e.g.* JX0044, JX0087,  
27 JX0095, JX0124). There is no similarity between the actors who perpetrated these  
28 alleged violations of law.

1 The alleged adverse actions are likewise various; Plaintiff complained of  
2 demotion, transfer, contractual violations, exclusion from meetings, and termination,  
3 all allegedly perpetrated with varying retaliatory motives. Even the alleged  
4 protected activity differed in each instance: Plaintiff testified that the 2002 transfer  
5 was a result of retaliation based on his complaints regarding Mr. Lipps, while the  
6 2009 transfer was a result of retaliation based on his complaints regarding Mr.  
7 Powell, while the various other alleged adverse actions resulted from retaliation  
8 based on his numerous other complaints about different individuals.

9 In *McRae*, the plaintiff argued that she had been subjected to differing adverse  
10 actions, including a transfer to a different position. *McRae*, 142 Cal. App. 4th at  
11 391. The court found, however, that the alleged activities were perpetrated by  
12 different actors, involving different subjects and motivations, precluding a  
13 successful continuing action claim. *Id.* at 391-92. The same is true here: the fact  
14 that Plaintiff's allegations are against different Fresenius employees who acted at  
15 different times with different motivations forestalls a finding that the alleged  
16 adverse acts constituted a continuous, similar pattern of activities. Accordingly,  
17 Plaintiff has failed to demonstrate sufficient evidence that the alleged adverse  
18 employment acts are "similar" in nature, as required by the continuous violation  
19 doctrine.

20 Likewise, Plaintiff failed to demonstrate that Fresenius's alleged adverse  
21 actions occurred with the requisite frequency to be considered part of a continuing  
22 course of conduct. To invoke the continuing violation doctrine, Plaintiff must  
23 demonstrate that the alleged adverse employment actions were frequent in nature.  
24 *Yanowitz* 36 Cal.App.4th at 1059. The *Richards* court asked the question in this  
25 way: "Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the  
26 nature of an isolated work assignment or employment decision?" *Richards*, 26 Cal.  
27 4th at 814; *see also Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031, 1042  
28 (2002) (distinguishing a collection of isolated employment decisions from a

1 continuing course of conduct). In *Yanowitz*, the court found sufficient frequency  
2 only where the alleged retaliatory actions occurred “steadily” over a period of four  
3 months. *Yanowitz*, 36 Cal.App.4th at 1059.

4 Here, the alleged adverse actions can hardly be described as frequent.  
5 Plaintiff was transferred only twice, the transfers occurring approximately seven  
6 years apart. Fresenius’s decision to not renew Plaintiff’s contract was attendant  
7 with his removal from the President of R&D position, and likewise was a one-off  
8 act. These were “isolated... employment decisions,” in the parlance of *Richards*,  
9 which were not connected either thematically or temporally. In all, Plaintiff  
10 complains of four adverse employment actions over the course of eight years, hardly  
11 the “bi-weekly” or “steady” course of activities referenced by *Richards* and  
12 *Yanowitz*. The instant alleged adverse actions are a collection of individual and  
13 isolated business decisions made by Fresenius at differing times over the course of  
14 Plaintiff’s career. Plaintiff’s evidence in regard to these adverse employment  
15 actions is insufficient to establish a continuing act.

16 Next, Plaintiff argued that as President of Research and Development, he was  
17 excluded from professional meetings at the direction of Mr. Powell, which was a  
18 continuing course of conduct. Plaintiff alleges that his systematic exclusion from  
19 these meetings, over a course of years from 2005 to 2009, constituted an adverse  
20 employment action, allegedly perpetrated in retaliation for Plaintiff’s various  
21 complaints of mistreatment. It is undisputed, however, that Plaintiff was removed  
22 as President of R&D as of April 1, 2009. The latest date he could have been  
23 excluded from meetings as President of R&D is April 1, 2009. Plaintiff filed his  
24 complaint with the DFEH on August 16, 2011, more than two years after his  
25 removal from the position, and certainly outside the attendant one-year statute of  
26 limitations. While the continuing violation doctrine may subject an employer to  
27 liability based upon adverse employment actions which occurred outside the statute  
28 of limitations, at least one act within the alleged course of conduct must have



1 occurred within the statute in order for the conduct to be actionable. *Trovato v.*  
2 *Beckman Coulter, Inc.* 192 Cal.App.4th 319, 326 (2011). Absent an actionable  
3 retaliatory act within the statutorily mandated time period, the claim is time-barred  
4 by the provisions of Cal. Gov. Code 12960(d). *Id.* Even assuming that Plaintiff  
5 provided enough evidence for a reasonable jury to conclude that he was excluded  
6 from meetings, and that such exclusion constituted an adverse and continuous  
7 action, Plaintiff's claim still must fail because the alleged adverse course of conduct  
8 completely falls outside of the relevant statute of limitations under the FEHA.

9 In fact, only one of Plaintiff's claimed adverse actions actually fits inside the  
10 statute of limitations: his termination from the company. No reasonable jury,  
11 however, could find that the termination was a part of a continuous or frequent  
12 course of conduct. The termination was one, isolated employment decision, remote  
13 in time from other alleged adverse activities. Plaintiff testified that Fresenius's last  
14 adverse act before his termination was his transfer from the President of R&D  
15 position to the role of Special Advisor to Mr. Lipps. The transfer was effective  
16 April 1, 2009; the termination was effective August 21, 2010, *a full eighteen months*  
17 *later*. No reasonable jury could find that Fresenius's alleged adverse acts were  
18 frequent or continuous when there is an indisputable eighteen (18) month lapse in  
19 alleged adverse activity prior to the last alleged unlawful act. As such, Plaintiff has  
20 not provided sufficient evidence to show that Fresenius engaged in a frequent,  
21 adverse course of conduct. Plaintiff's continuing retaliation claim thus fails, and  
22 Fresenius is entitled to a judgment as a matter of law.

23 **E. Plaintiff did not Present Sufficient Evidence to Demonstrate that**  
24 **the Alleged Course of Retaliatory Conduct did not Reach a Degree**  
25 **of Permanence**

26 Even assuming, *arguendo*, Plaintiff did demonstrate that the alleged adverse  
27 activities were similar in kind and sufficiently frequent, his appeal to the continuing  
28 violation doctrine still must fail under the third prong of the *Richards* and *Yanowitz*  
test. To invoke the continuing violation doctrine, Plaintiff must demonstrate that the

1 alleged unlawful course of conduct did not reach a degree of permanence outside the  
2 statute of limitations. *Yanowitz*, 36 Cal.App.4th at 1059; *Richards*, 26 Cal.App.4<sup>th</sup>  
3 822. Put another way, Plaintiff must demonstrate that the alleged course of  
4 retaliatory conduct did not complete more than one year before the filing of his  
5 claim with the DFEH. *Id.* In this context, a degree of permanence is reached when  
6 the employer's alleged course of conduct (1) triggers an employee's awareness of  
7 and duty to assert his or her rights; and (2) makes clear that alleged mistreatment  
8 will not be remedied by the employer. *Richards*, 26 Cal.App.4th at 823.

9 As a matter of policy, the continuation doctrine is aimed at "preventing  
10 employees from being forced into bringing actions that are unripe for adjudication,  
11 and encouraging informal resolution of disputes." *Gardner*, 838 F. Supp. 2d at 920.  
12 The doctrine is designed to protect a plaintiff who alleges "a series of subtle, yet  
13 damaging, injuries," where the plaintiff may be unaware that the pattern of activity  
14 may be actionable, or where legal action would be impractical or premature.  
15 *Yanowitz*, 36 Cal. App. 4th at 1055<sup>1</sup>. The doctrine does not apply, however, where  
16 a plaintiff alleges various adverse actions which were "separate, discrete events that  
17 were ripe for legal adjudication when they occurred." *Gardner*, 838 F. Supp. 2d at  
18 919-920. Such discrete events, by their nature, achieve a degree of permanence  
19 such that a plaintiff should be aware that he has a duty to assert his rights under the  
20 FEHA. *Id.*; *see also Yanowitz*, 36 Cal. 4th at 1058-59 (stating that the continuing  
21 violation doctrine is aimed at a retaliatory course of conduct, rather than discrete  
22 acts of retaliation).

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26 <sup>1</sup>*See also Richards*, 26 Cal.App.4th at 820-24 (course of adverse conduct in relation to an  
27 alleged failure to accommodate an employee's disability did not reach a degree of  
28 permanence where plaintiff was actively engaged in an interactive process within the  
statute of limitations. The court found that since the employer had not reached a final  
decision regarding the matter, and even left open opportunity for further negotiations, the  
employee was not on notice that he had a duty to assert his rights).



1 Plaintiff has not claimed that the alleged pattern of retaliatory acts was a  
2 series of subtle, yet damaging injuries as described in *Yanowitz*; rather, the charged  
3 adverse actions (termination, position transfers, etc.) were overt acts carried out by  
4 Fresenius under no pretense. Plaintiff regarded his transfer to the President of R&D  
5 position in 2002 as retaliatory in nature *at the time of the transfer*. He even  
6 submitted email and other written communications which confirmed his belief. *See*  
7 JX0015. The same is true for his transfer to the Special Advisor role in 2009  
8 (JX0046). Plaintiff was informed by Fresenius representatives that these actions  
9 were final in nature, putting him on notice that Fresenius regarded the matters as  
10 complete and would take no further steps to remedy the perceived wrong. In other  
11 words, the actions achieved a degree of permanence.

12 In *Gardner*, the court found that an employer's decision to retire an employee  
13 and its multiple further decisions to deny reinstatement were "separate, discrete  
14 events that were ripe for legal adjudication when they occurred." *Gardner*, 838 F.  
15 Supp. 2d at 920. Since the plaintiff believed had suspicions that his employer had  
16 acted wrongfully, he "was on notice [that] his rights were being violated that his  
17 claim was ripe for adjudication." *Id.* Each of the rejections "had a degree of  
18 permanence which should [have] trigger[ed the] employee's awareness of and duty  
19 to assert his rights." "Because [the d]efendant's actions had acquired a degree of  
20 permanence, the continuing violation doctrine [did] not apply." *Id.* at 921.<sup>2</sup>

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23 <sup>2</sup>*See also Cucuzza v. City of Santa Clara*, 104 Cal. App. 4th 1031, 1042-43 (2002). In  
24 *Cucuzza*, the employer responded to the plaintiff's complaints about mistreatment by  
25 offering her a transfer out of her division. *Id.* The court could "conceive of little that  
26 would be a more definitive denial of plaintiff's request... than an offer to transfer her out  
27 of the job altogether." *Id.* The court concluded that the plaintiff "should have known that  
28 further efforts to resolve the situation would be futile," and ruled that the adverse action  
acquired the requisite degree of permanence to forestall a continuing violation claim. *Id.*  
The same principle is present in the instant matter: Plaintiff should have known that any  
alleged course of adverse conduct reached a degree of permanence once Fresenius offered  
Plaintiff a transfer to another department. At that point, Fresenius had expressed its

1 Similarly, the alleged adverse actions in the present case were ripe for  
2 adjudication. Plaintiff was on notice that he had the opportunity and duty to assert  
3 his rights in regard to the alleged adverse actions and Fresenius informed Plaintiff  
4 that its employment decisions were final. The permanence of Fresenius's actions  
5 was only underscored by Plaintiff's unsuccessful written complaints to Fresenius  
6 regarding these matters, and Fresenius's refusal to change its decisions.<sup>3</sup> These  
7 matters were complete at the time they occurred; they were discrete acts.

8 Plaintiff had a duty to file an action in relation to these alleged adverse  
9 activities within the statute of limitations for FEHA claims. He failed to do so.  
10 These untimely alleged violations of the law cannot be revived through a contrived  
11 claim of a continuing action. In sum, Plaintiff alleged that Fresenius engaged in a  
12 systematic course of conduct aimed at retaliating against him over a period of eight  
13 years<sup>4</sup>; but, he failed to present sufficient evidence upon which a jury could find  
14 that Fresenius engaged in a continuing violation of any kind. Without the crutch of  
15 his contrived continuing violation claim, Plaintiff's retaliation charge is threadbare  
16 and unsupported by reasonable evidence. Fresenius is entitled to a judgment as a  
17 matter of law.

18 **IV. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO**  
19 **SUPPORT HIS CLAIM FOR FAILURE TO PREVENT**  
20 **RETALIATION IN VIOLATION OF THE FEHA**

21 Plaintiff's next claim is that Fresenius failed to take adequate steps to prevent  
22 retaliation. California Government Code section 12940(k) makes it unlawful "[f]or

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23 unwillingness to further act toward ameliorating Plaintiff's perceived mistreatment. The  
24 adverse course of conduct, if any, completed when Fresenius offered the transfers.

25 <sup>3</sup>*See Do v. Cnty. of Los Angeles*, 2011 WL 3667498, at \*7 (Cal. Ct. App. Aug. 22, 2011)  
26 (employer's rejections of employee's requests for promotion acquired degree of  
27 permanence as soon as the decisions were made and communicated to plaintiff, "with [the]  
sense of permanence only heightened by the results of the plaintiff's unsuccessful  
grievances and appeals."

28 <sup>4</sup>A time period during which, Plaintiff received a substantial salary, significant bonuses,  
pay raises, interest free loans, and even gifts from the company.

1 an employer... to fail to take all reasonable steps necessary to prevent  
2 discrimination and harassment from occurring.”<sup>5</sup> A successful claim for failure to  
3 prevent discrimination, however, requires a finding that discrimination actually  
4 occurred. *Trujillo v. North County Transit District*, 63 Cal. App. 4th at 284-287.  
5 “There's no logic that says an employee who has not been discriminated against can  
6 sue an employer for not preventing discrimination that didn't happen, for not having  
7 a policy to prevent discrimination when no discrimination occurred.” *Id.* at 284. The  
8 same is true for cases involving an alleged failure to prevent retaliation: “to establish  
9 a claim for failure to prevent retaliation, a plaintiff must first establish the  
10 underlying retaliation.” *Trulsson v. Cnty. of San Joaquin Dist. Attorney's Office*,  
11 2014 WL 4748117, at \*8 (E.D. Cal. Sept. 23, 2014); *see also Abney v. Bd. of*  
12 *Trustees of the California State Univ.*, 2013 WL 2241922, at \*11 (Cal. Ct. App.  
13 May 20, 2013) (“without retaliation, [the defendant] could not be liable for failure to  
14 prevent retaliation.”).

15 As explored in Section III, *supra*, Plaintiff’s retaliation claim lacks legal and  
16 factual support. Equally as important, the evidence showed that Fresenius had  
17 antidiscrimination policies in place and fully investigated his claims. There can be  
18 no liability for failure to prevent retaliation when an employer takes reasonable steps  
19 to prevent retaliation, including, e.g., conducting prompt investigation of the  
20 underlying claims, promulgating anti-discrimination and anti-retaliation policies, or  
21 implementing procedures to handle complaints and grievances. (*Cal. Fair*  
22 *Employment & Housing Com. v. Gemini Aluminum Corp.*, 122 Cal. App. 4th 1004,  
23 1025 (2004); *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.*, 103 Cal.  
24 App. 4th 1021, 1035 (2002)). Plaintiff admitted that Fresenius took these exact  
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26 <sup>5</sup>This provision has been interpreted to include an action for failure to prevent retaliation.  
27 *See e.g. Taylor v. City of Los Angeles Dept. of Water and Power*, Cal.App.4th 1216, 1240  
28 (2006) (“In accordance with... the fundamental public policy of elimination of  
discrimination in the workplace under the FEHA, we conclude that retaliation is a form of  
discrimination actionable under [Gov. Code] section 12940, subdivision (k).”)

1 actions. Thus, Plaintiff failed to present evidence upon which a reasonable jury  
2 could find that Fresenius failed to prevent retaliation. Fresenius is entitled to a  
3 judgment as a matter of law in relation to Claim Two.

4 **V. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO**  
5 **ESTABLISH WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC**  
6 **POLICY**

7 In his third cause of action, Plaintiff alleges that his termination contravened  
8 fundamental public policy. To succeed in his claim, Plaintiff must prove that a  
9 violation of public policy was a substantial motivating factor for his termination.  
10 See CACI No. 2430. Plaintiff claims that Fresenius violated the public policy  
11 embodied in the FEHA and alleges that the violation was a substantial motivating  
12 factor for his termination<sup>6</sup>. D.I. 34 at 15:13-16. Plaintiff admits that his retaliation,  
13 failure to prevent retaliation, and wrongful termination claims are “factual[ly]...  
essentially indistinguishable.” D.I. 78 at 13-14.

14 “[W]hen the constitutional provision or statute articulating a public policy  
15 also includes certain substantive limitations in scope or remedy, these limitations  
16 also circumscribe the common law wrongful discharge cause of action. Stated  
17 another way, the common law cause of action cannot be broader than the  
18 constitutional provision or statute on which it depends, and therefore it presents no  
19 impediment to employers that operate within the bounds of law.” *Dutra v. Mercy*  
20 *Medical Center Mt. Shasta*, 209 Cal.App.4th 750, 756 (2012) (citations omitted).  
21 Thus, the same limitations and shortcomings which define and defeat Plaintiff’s  
22 retaliation claim apply equally to his wrongful termination claim. As explored in  
23 Section III, *supra*, Plaintiff failed to provide sufficient evidence for a reasonable  
24 jury to find that his termination of employment was causally linked to protected  
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28 <sup>6</sup> Plaintiff has not identified, either in pleadings or in testimony, any other public policy as  
a basis for the wrongful termination action.

1 activity<sup>7</sup>, or to find that he timely exhausted all administrative remedies. Plaintiff  
2 failed to present evidence upon which a reasonable jury could find in his favor.<sup>8</sup>  
3 Fresenius is entitled to a judgment as a matter of law in relation to Claim Three.

4 **VI. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO**  
5 **ESTABLISH ANY CONTRACTUAL VIOLATION OR BREACH OF**  
6 **CONTRACT**

7 In addition to his various causes of action arising out of the FEHA, Plaintiff  
8 alleges a breach of contract claim. Plaintiff asserts that Fresenius was contractually  
9 obligated to pay him two years' worth of severance pay at the time that he was  
10 terminated from the company. To support the claim, Plaintiff presented the 2003  
11 employment contract between Fresenius and himself (JX0001). Plaintiff cited a  
12 contractual provision which allows for payment of two years' worth of severance  
13 pay in the event that Plaintiff's employment with the company was terminated. *See*  
14 JX0001 at §6(a)(iv). The contract was for a term of one year, automatically  
15 renewing each year unless either party gave thirty (30) days' notice of their intent  
16 not to renew. *See* JX0001 at §2. Fresenius properly notified Plaintiff of its intent to  
17 not renew the contract in February of 2009, more than 30 days' prior to the

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19 <sup>7</sup>The lack of temporal proximity between Plaintiff's alleged protected activity and his  
20 termination from Fresenius also precludes a reasonable jury from finding that the alleged  
violation of public policy was a "substantial motivating factor" for the termination.

21 <sup>8</sup>To the extent Plaintiff's claim for wrongful termination is predicated on Fresenius's  
22 decision to not renew the contract, the claim must fail as a matter of law. Such a decision  
23 cannot serve as a basis for a wrongful termination action because it is not akin to a  
24 termination. *See, Touchstone Television Productions v. Superior Court*, 208 Cal.App.4th  
25 676, 682 (2012) (stating "[t]hat [defendant]'s decision not to renew [plaintiff's] contract  
26 for an additional season might have been influenced by her complaints about an unsafe  
27 working condition... does not change our conclusion in light of the principle that a decision  
28 not to renew a contract set to expire is not actionable in tort."); *Landry v. Sycamore*  
*Networks, Inc.*, 76 Mass. App. Ct. 1104, 918 N.E.2d 882 (2009) (stating that the "failure to  
renew an employment contract after its expiration is not an actionable tort" and  
"summarily reject the plaintiff's claim of wrongful termination because the employment  
agreement was for a term of years that expired and was not renewed"). Moreover, his  
transfer to the Senior Advisor role in April 1, 2009 was not a termination. Even if it could  
be construed as one, the claim is time barred. This action was filed in August 2011, over  
two years later, well outside the statute of limitations for a wrongful termination claim.  
*See Barton v. New United Motor Mfg., Inc.*, 43 Cal. App. 4th 1200, 1209 (1996).

1 automatic renewal date of April 1. *See* JX0063. Plaintiff was terminated from  
2 Fresenius eighteen (18) months after Fresenius informed him of its decision to not  
3 renew the contract. *See also* JX0104 (informing Plaintiff that his employment was  
4 terminated effective August 21, 2010).

5 In Massachusetts<sup>9</sup>, “a contractual relationship is necessary to bring a claim  
6 for breach of contract.” *Hayden v. Hayden*, CA 921539, 1993 WL 818823 (Mass.  
7 Super. Dec. 13, 1993) (citing *Jurgens v. Abraham*, 616 F. Supp. 1381, 1387  
8 (D.Mass.1985)). A “lack of any contractual relationship...preclude[s] a successful  
9 breach of contract claim.” *Liberty Mut. Ins. Co. v. Murad*, 1992 Mass. App. Div.  
10 163 (Dist. Ct. 1992); *see also Jurgens v. Abraham*, 616 F. Supp at 1387. “Where  
11 the existence of a contract is in issue, the burden is on the [party seeking  
12 performance].” *JPMorgan Chase & Co., Inc. v. Casarano*, 81 Mass. App. Ct. 353,  
13 356, 963 N.E.2d 108, 111 (2012) (citing *Canney v. New England Tel. & Tel. Co.*,  
14 353 Mass. 158, 164, 228 N.E.2d 723 (1967)). Thus, to be successful in his breach of  
15 contract claim, Plaintiff must demonstrate that there was a valid and existing  
16 contractual agreement in place at the time of the alleged breach. Since the  
17 Plaintiff’s termination occurred more than a year after the non-renewal, Plaintiff  
18 necessarily must prove that the contractual relationship survived Fresenius’s non-  
19 renewal decision.

20 Contractual obligations, however, do not survive the non-renewal of a  
21 contract. *Scott v. Boston Hous. Auth.*, CIV.A. 88-5555-E, 2003 WL 21960316  
22 (Mass. Super. July 14, 2003) *aff’d*, 64 Mass. App. Ct. 693, 835 N.E.2d 278 (2005)  
23 (*Scott*). In *Scott*, the plaintiff was successful in his claim that his employer’s  
24 decision to refrain from renewal of an employment agreement was based on  
25 unlawful age discrimination. After receiving a judgment, Scott filed a motion for  
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27 <sup>9</sup> The breach of contract claim is governed by Massachusetts law in accordance with the  
28 explicit agreement in the contractual provisions. *See* Exh. No. 1, page JX0001-5,  
paragraph 13.



1 pre-judgment interest. *Id.* Scott argued that since the case sounded in contract, he  
2 was entitled to pre-judgment interest calculated from the time of the breach. *Id.*  
3 The court ruled against Scott, finding that “the original employment agreement was  
4 fully performed and the [defendant] owed no contractual obligation to renew Scott's  
5 employment. And in the absence of a contractual obligation there can be no  
6 breach.” *Id.* On appeal, the Appeals Court of Massachusetts “affirm[ed] the  
7 decision of the Superior Court in all respects,” adding that there “was not a breach  
8 of any contractual obligation. Scott's original employment agreement was fully  
9 performed, and the [defendant] was under no contractual obligation to renew his  
10 employment.”

11 *Scott*, 64 Mass. App. Ct. at 693-696.

12 Similarly, Fresenius’s contractual obligations ended at the time the agreement  
13 expired. Cessation of the 2003 Employment Agreement by non-renewal was  
14 explicitly contemplated by the parties, *see* JX0001 at §2 , and the parties made no  
15 provision that the severance package option would extend beyond the natural  
16 expiration of the agreement. Fresenius properly executed the non-renewal in  
17 accordance with the contractual provisions. The non-renewal effectively ended the  
18 contractual relationship between Plaintiff and Fresenius and Fresenius no longer  
19 owed Plaintiff any contractual obligation, let alone an obligation to pay two years’  
20 worth of severance pay. Plaintiff’s claim for a breach of contract which occurred  
21 outside the contractual time period cannot be legally sustained.

22 To the extent Plaintiff asserts that the non-renewal decision was equivalent to  
23 a termination, his claim must also fail. By law, a company’s decision to not renew  
24 an employee’s contract is not akin to a termination. *See Landry*, 76 Mass. App. Ct.  
25 at 918 (stating that the “failure to renew an employment contract after its expiration  
26 is not an actionable tort” and “reject[ing] the plaintiff's claim of wrongful  
27 termination because the employment agreement was for a term of years that expired  
28 and was not renewed”). But even if it was possible for a non-renewal decision to be

equated to a termination, Plaintiff's own testimony shows that he was not fired at the expiration of the contract. Plaintiff testified that he continued to receive compensation for his work for Fresenius after his transfer from the R&D position to the Special Advisor role. Plaintiff continued to receive the same salary (and later an increased salary) paid by the same company in the same manner. *See also* JX0148, JX0149, JX0150, and JX0151 (paystubs showing that Plaintiff was paid by the same entity after the cessation of the contract). If Plaintiff is truly claiming that he was terminated from one Fresenius entity at the expiration of the contract, and then subsequently rehired by a different Fresenius entity, he has not provided any documentation or testimony to support the allegation. No reasonable jury could find a contractual duty was owed or that there was a breach of said duty. Fresenius is entitled to a judgment as a matter of law in regard to Claim Four.

**VII. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**

Finally, Plaintiff claims that Fresenius violated the implied covenant of good faith and fair dealing when the company terminated him. In this regard, Plaintiff makes two allegations: First, Plaintiff argues that Fresenius breached the implied covenant of good faith and fair dealing in the 2003 employment agreement. Second, Plaintiff argues (in the alternative) that his termination violated the covenant of good faith and fair dealing attendant with his at-will employment.

**A. There Was No Breach of the Implied Covenant of Good Faith and Fair Dealing in Conjunction with the 2003 Employment Agreement**

Plaintiff alleges that his breach of contract claim and his contractual breach of the implied covenant claim are "essentially indistinguishable." D.I. 78 at 23:6-8. "[C]laims for breach of the implied covenant of good faith and fair dealing[, however,] are distinct from simple breach of contract claims and require additional factual allegations of unfairly leveraging the contract terms for undue economic



1 advantage.” *Christensen*, 360 F. Supp. 2d at 229; cf. *Cherick Distributors, Inc. v.*  
2 *Polar Corp.*, 41 Mass. App. Ct. 125, 127 (1996).

3 As detailed above (*see* Section VI, *supra*) Plaintiff’s breach of contract  
4 claim must fail as a matter of law: Plaintiff was not terminated from Fresenius  
5 during the contractual term and Fresenius rightfully (in accordance with the terms of  
6 the April 2003 agreement) exercised its option not to renew Plaintiff’s employment  
7 contract. Additionally, Plaintiff presented no evidence that Fresenius’s non-renewal  
8 decision was made to reap some undue economic advantage. Fresenius was  
9 authorized by contract to take such action and Plaintiff’s separation only occurred  
10 after Fresenius attempted to negotiate a new contract with him.

11 Though an “implied covenant of good faith and fair dealing [is] implicit in all  
12 Massachusetts contracts,” *Harrison v. Net Centric Corp.*, 744 N.E.2d 622, 629  
13 (Mass. 2001), contracts must still be enforced as written because the “covenant [of  
14 good faith and fair dealing] cannot be used to supply contract terms that were not  
15 negotiated or provided.” *Canovas v. Univ. of Massachusetts Med. Sch.*, 83 Mass.  
16 App. Ct. 1123, 985 N.E.2d 413 (2013). Under the plain terms of the contract,  
17 Fresenius had no obligation beyond the non-renewal of the April 2003 employment  
18 agreement to pay 2 years severance and thus achieved no economic advantage by  
19 terminating Plaintiff in August 2010; doing so did not relieve the company of any  
20 economic burden or garner it any improper income. Thus, there was no breach of  
21 the implied covenant in the 2003 agreement.

22 **B. There Was No Breach of the Implied Covenant of Good Faith and**  
23 **Fair Dealing in Conjunction with Plaintiff’s At-Will Employment**

24 Plaintiff’s at-will argument is similarly flawed. At-will employment  
25 agreements, like employment contracts, contain “an implied covenant of good faith  
26 and fair dealing, which limits the conditions under which employment may be  
27 terminated.” *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 477,  
28 589 N.E.2d 1241, 1246 (1992). But Massachusetts courts “have limited the

1 application of this exception to cases in which an employer fires an employee and  
2 thereby deprives him or her of bonuses, commissions, or wages.” *Id.* Thus, to  
3 succeed in his claim, Plaintiff must prove that Fresenius acted in bad faith to  
4 “deprive [him] of the fruits of labor already substantially earned...” *Christensen v.*  
5 *Kingston Sch. Comm.*, 360 F. Supp. 212, 226, *supra*.

6 Plaintiff continued to receive a high salary and bonus from Fresenius after the  
7 contract expired and all the way up to his termination. The terms of the written  
8 contract expired, so Plaintiff was not entitled to receive the benefits of that contract  
9 from April 1, 2009 until his termination on August 21, 2010. In his Memorandum of  
10 Contentions of Fact and Law, D.I. 78 at 23:12-24:8, Plaintiff relied upon *Fortune v.*  
11 *Nat’l Cash Register Co.* to support his breach of the implied covenant claim. 373  
12 Mass. 96, 364 N.E.2d 1251 (1977) (holding that a company had breached an implied  
13 covenant of good faith in the contract by terminating an at-will employee when that  
14 employee was on “the brink” of making a sale that would garner him a considerable  
15 commission). His reliance on *Fortune*, however, is misplaced. *Fortune* and its  
16 progeny have been found to “provide that an employer is accountable to a  
17 discharged employee for unpaid compensation if the employee was terminated in  
18 bad faith and the compensation is clearly connected to work already  
19 performed.” *Harrison v. Net Centric Corp.*, 744 N.E.2d 622, 629 (Mass. 2001); *see*  
20 *also, Cort v. Bristol-Myers Co.*, 431 N.E.2d 908 (Mass. 1982); *Gram v. Liberty*  
21 *Mut. Ins. Co.*, 429 N.E.2d 21 (Mass. 1981); *Sargent v. Tenaska, Inc.*, 108 F.3d 5, 8  
22 (1st Cir. 1997). Plaintiff has not claimed that Fresenius owes him compensation  
23 “clearly connected to work already performed.” *Id.* Plaintiff’s only claim is that he  
24 was entitled to the two year severance contractual provision and not that he was  
25 deprived of compensation owed to him for past services rendered. *See Saxonis v.*  
26 *City of Lynn*, 62 Mass. App. Ct. 916, 918, 817 N.E.2d 793, 797 (2004) (holding that  
27 plaintiff’s “claim for breach of the covenant of good faith and fair dealing cannot  
28

1 succeed as her complaint does not allege that her termination served to deprive her  
2 of compensation owed for past performance”).

3 Thus, Plaintiff did not provide sufficient evidence upon which a reasonable  
4 jury could conclude that he is entitled to relief. Plaintiff’s cause of action regarding  
5 an alleged breach of the implied covenant of good faith and fair dealing fails as a  
6 matter of law, and Fresenius is entitled to a judgment on Claim Five.

7 **VIII. PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE TO**  
8 **ESTABLISH THAT HE IS ENTITLED TO PUNITIVE DAMAGES**

9 To be successful in a claim for punitive damages, a plaintiff must prove by  
10 clear and convincing evidence that the defendant engaged in “malice, oppression, or  
11 fraud<sup>10</sup>.” See Cal. Civ. Code § 3294; *Brandon v. Rile Aid Corp., Inc.* 408 F.Supp.2d  
12 964, 982 (E. Cal. 2006) (“To recover punitive damages under this provision,  
13 [plaintiff] must establish by clear and convincing evidence that [defendant] acted  
14 with oppression, fraud, or malice toward her”). “Clear and convincing” evidence  
15 must be “sufficiently strong to command the unhesitating assent of every reasonable  
16 mind.” See *Mathieu v. Norrel Corp.*, 115 Cal.App.4th 1174, 1190 (2004). Punitive  
17 damages are never awarded as a matter of right, are disfavored by the law, and  
18 should be granted with the greatest of caution and only in the clearest of cases.  
19 *Henderson v. Security Pac. Nat. Bank*, 72 Cal. App. 3d 764, 771 (1977).

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21  
22 <sup>10</sup>The statute defines “malice” as “conduct which is intended by the Defendant to cause  
23 injury to the Plaintiff or despicable conduct which is carried on by the Defendant with a  
24 willful and conscious disregard of the rights and safety of others.” Cal. Civ. Code §  
25 3294(c)(1). It defines “oppression” as “despicable conduct that subjects a person to cruel  
26 and unjust hardship and conscious disregard of that person's rights.” Cal. Civ. Code §  
27 3294(c)(2). It defines “fraud” as an “intentional misrepresentation, deceit, or concealment  
28 of a material fact known to the defendant with the intention on the part of the defendant of  
thereby depriving a person of property or legal rights or otherwise causing injury.” Cal.  
Civ. Code § 3294(c)(3).

Omitted from Plaintiff's case is a legally sufficient evidentiary basis establishing that Plaintiff is entitled to an award of punitive damages. As outlined above, Plaintiff's FEHA claims fail and he cannot recover punitive damages on a contract claim<sup>11</sup>. Moreover, Plaintiff has offered no evidence of malice, fraud, or oppression in relation to any of his causes of action. Thus, Plaintiff's claim for punitive damages must fail as a matter of law.

## **IX. CONCLUSION**

For the foregoing reasons, Defendant Fresenius Medical Care North America respectfully requests that this court grant its motion for judgment as a matter of law as to all of Plaintiff's claims and enter judgment in Fresenius's favor.

Date: January 16, 2015

Respectfully submitted,

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<sup>11</sup>See *Palmer v. Ted Stevens Honda, Inc.* 193 Cal.App.3d 530, 536 (1987); *DeRose v. Putnam Mgmt. Co.*, 496 N.E.2d 428, 432 (Mass. 1986).

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on January 16, 2015 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ. L.R. 5-3.3. Any other counsel of record will be served by U.S. mail or hand delivery.

By: /s/ Juanita R. Brooks

Juanita R. Brooks